United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 26, 2006

TO : Frederick J. Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Competitive Interiors, Inc.
Case 8-CA-36410

This BE & K[1] case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by filing and maintaining a lawsuit seeking a stay of a work jurisdiction arbitration, pending the resolution of the Board's Section 10(k) procedures.

We agree with the Region that it should dismiss the charge in the instant case, absent withdrawal, as the Employer's lawsuit was reasonably based, and there is no evidence that it was filed solely to impose the costs of litigation on the Charging Party Union without regard to the lawsuit's merits.

FACTS

Competitive Interiors, Inc (the Employer) has collective-bargaining agreements with various labor organizations, including Laborers International Union of North America, Local #1015 (the Laborers), and the Ohio and Vicinity Regional Council of Carpenters (the Carpenters). The current Laborers' agreement includes language giving the Laborers jurisdiction over certain "tending" and handling work, including unloading, handling, and distributing all materials, fixtures, furnishings, and appliances from point of delivery to stockpiles and from stockpiles to the approximate point of installation. The current Carpenters' agreement gives the Carpenters jurisdiction over the handling of raw lumber and drywall from the nearest point of distribution and the handling from the delivery truck of fixtures, display cases, finished lumber, and metal and plastic trim to be erected by carpenter employees. Thus, both agreements confer jurisdiction over at least some of the same work.

From April or May 2004 until August 2005, the Employer employed both Laborers and Carpenters unit employees on a

[1] BE & K Construction Co. v. NLRB, 536 U.S. 516 (2000).

jobsite in Massillon, Ohio. The Employer assigned the disputed work at this jobsite to the Carpenters.

On May 11, 2005, the Laborers filed a grievance against the Employer alleging a violation of the jurisdictional language of their collective-bargaining agreement based on the Carpenters doing the Laborers' work. On June 9, 2005, the Laborers demanded arbitration through the American Arbitration Association. The arbitration was scheduled for Monday, February 20, 2006.

On February 8, 2006, the Carpenters notified the Employer that if it failed to assign the Carpenters any of disputed work covered by the Carpenters agreement, the Carpenters would pull its members off the Employer's projects and/or picket the Employer's jobsites.

On February 13, 2006, the Employer filed 8-CD-497 alleging that the Carpenters violated Section 8(b)(4)(D) of the Act by threatening to picket the Employer's jobsites and/or pull its members off the Employer's jobsites if the Employer failed to assign the Carpenters the work in dispute.

On February 16, 2006, the Employer filed a lawsuit in United States District Court seeking to stay the arbitration, pending the outcome of the unfair labor practice case. On February 17, 2006, the district court granted the Employer a temporary restraining order. By order dated March 3, 2006, the district court granted the Employer a preliminary injunction. The Employer's request for a permanent injunction is still pending before the district court.

On February 24, 2006, the 10(k) hearing was held before a Board Agent. The hearing closed the same date, and Case 8-CD-497 is currently being reviewed by the Board.

On February 17, 2006, the Laborers filed the charge in the instant case, alleging that the Employer's lawsuit violated Section 8(a)(1), (4), and (5) of the Act as it was filed in retaliation for the Laborers' grievance and demand for arbitration. In particular, the Laborers assert that the Employer acted in collusion with the Carpenters in order to orchestrate the 10(k) proceedings before the Board and that, as the arbitration was scheduled for eight months before any legal action by the Employer, the Employer waited to file the lawsuit in order to inflict maximum damage on the Laborers by forcing them to first prepare for the arbitration and then defend the lawsuit. The Laborers have not offered any evidence other than the timing that would show that the Employer and Carpenters acted in

collusion, or that the suit was filed with a retaliatory motive.

ACTION

We agree with the Region that it should dismiss the charge in the instant case, absent withdrawal, as the Employer's lawsuit was reasonably based and there is no evidence that it was filed solely to impose the costs of litigation on the Laborers without regard to the lawsuit's merits.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.[2] Previously, in Bill Johnson's Restaurants, the Court had articulated two standards for evaluating lawsuits, one for ongoing suits and one for concluded suits.[3] For ongoing lawsuits, the Bill Johnson's Court held that the Board may halt the prosecution of the suit if it lacks a reasonable basis in fact or law and was brought for a retaliatory motive.[4] For concluded suits, the Court held that if the litigation resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit, the Board could find a violation if the suit was filed with a retaliatory motive.[5] Thus, even if a concluded suit had been reasonably based, the Board could find an unfair labor practice if the suit was unsuccessful and retaliatory.

In BE & K, the Court rejected the Bill Johnson's standard for adjudicating unsuccessful but reasonably based lawsuits.[6] The Court reasoned that the standard was overly broad because the class of lawsuits punished included a substantial portion of suits that involved genuine petitioning protected by the Constitution.[7] The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately meritless, but must

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[2] Id. At 528.

[3] 461 U.S. at 747-749.

[4] Id. at 748-749.

[5] Id. at 747, 749.

[6] 536 U.S. at 536.

[7] Id. at 529-533.

determine whether the lawsuit, regardless of its outcome on the merits, was reasonably based.[8]

The BE & K Court also considered the Board's standard of finding retaliatory motive in cases in which "the employer could show the suit was not objectively baseless."[9] The Court held that inferring a retaliatory motive from general evidence of antiunion animus, in a reasonably based but meritless case, would condemn genuine petitioning in circumstances where the plaintiff's "purpose is to stop conduct he reasonably believes is illegal[.]"[10] In dictum, however, a majority of the Court left open the possibility that an unsuccessful but reasonably based lawsuit might be considered an unfair labor practice if a litigant would not have filed it "but for a motive to impose the costs of the litigation process, regardless of the outcome."[11]

As the Court in BE & K did not re-articulate the standard for determining whether a lawsuit is baseless, the standard set forth in Bill Johnson's remains authoritative. In Bill Johnson's, the Court ruled that while the Board's inquiry need not be limited to the bare pleadings, the Board could not make credibility determinations or draw inferences from disputed facts so as to usurp the fact-finding role of the jury or judge.[12] Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."[13] Thus, a lawsuit can be deemed baseless only if it presents unsupportable facts or unsupportable inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

Here, we agree with the Region that the Employer's lawsuit was reasonably based both in fact and in law. Initially, of course, we note that the Employer won a

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[8] Ibid.

[9] Id. at 533.

[10] Id. at 534.

[11] Id. at 536-537. See also id. at 539 (Breyer, J., concurring).

[12] 461 U.S. at 744-746. See also Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960, 963 (2000).

[13] 461 U.S. at 747.

temporary restraining order and preliminary injunction in the lawsuit. Substantively, there is no evidence that demonstrates any collusion between the Employer and the Carpenters, or that the lawsuit was improper in any other manner. Rather, all of the evidence indicates that the work jurisdiction at issue is legitimately in dispute, and that the Employer was merely responding to the Carpenters' threat of strike on February 8, 2006 by seeking to have the Board determine the jurisdictional dispute under the applicable Sections 8(b)(4)(D) and 10(k).

As for the legal basis for the lawsuit, it is well-established that, under Section 10(k) "it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision."[14] Moreover, other than the 10(k) hearing sought in the lawsuit, there would have been no adjudicatory process that would have included all of the parties here; the arbitration sought by the Laborers would have only included the parties to its agreement – itself and the Employer. By contrast, the 10(k) hearing also included the Carpenters. Therefore, we agree with the Region that the Employer's lawsuit was reasonably based.

With regard to retaliatory motive, it has not been established that the Employer's reasonably-based suit was filed in retaliation for the Laborers' demand for arbitration or to "impose the costs of litigation" on the Laborers. Although the lawsuit was filed on the eve of the arbitration hearing, despite that hearing's having been scheduled for approximately eight months, there is no evidence that indicates that such timing was motivated by anything other than the circumstances facing the Employer here. Thus, the Employer was presented with the Carpenters' threat of strike on February 8, 2006, first triggering the applicability of Sections 8(b)(4)(D) and 10(k). It filed the charge in Case 8-CD-497 within five days, on February 13, 2006, and filed the lawsuit at issue seeking to stay the arbitration pending the resolution of the unfair labor practice case within three days after that, on February 16, 2006. Based on these circumstances, we agree with the Region that there is no evidence that the Employer filed the lawsuit at issue here solely to impose the costs of litigation on the Laborers without regard to the lawsuit's merits.

[14] NLRB v. Electrical Workers, Local 1212 (Columbia Broadcasting), 364 U.S. 573, 586 (1961).

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.